No. 13,745

IN THE

United States Court of Appeals

For the Ninth Circuit

FONG WONE JING, FONG HUNG WING and FONG NGAR JING, by their Guardian Ad Litem, William Y. Fong,

Appellants,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Appellee.

BRIEF FOR APPELLEE.

LLOYD H. BURKE,
United States Attorney,
CHARLES ELMER COLLETT,
Assistant United States Attorney,
422 Post Office Building,
7th and Mission Streets, San Francisco 1, California,
Attorneys for Appellee.

MORTON M. LEVINE,
Immigration and Naturalization Service,
On the Brief.

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Subject Index

Table of Authorities Cited

Statutes

Miscellaneous

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BRIEF FOR APPELLEE.

INTRODUCTORY STATEMENT.

The appeals in this case and in cases No. 13,746, *Chow Sing etc., v. Brownell,* and No. 13,808, *Ly Shew, etc., v. Dulles,* are concerned with claims to United States nationality by Chinese who are not residents of the United States, founded upon alleged blood relationship as children to fathers who are citizens of the United States. The judgment in each of the cases followed the opinion of Judge Louis E. Goodman in

the *Ly Shew* case, 110 F. Supp. 550. Each claimant has not previously resided or entered the United States, the claim of nationality is therefore derivative, not native birth. In the above case and the *Ly Shew* case the Secretary of State is the defendant. In the *Chow Sing* case the Attorney General is the defendant.

STATUTES.

"§903. Judicial proceedings for declaration of United States nationality in event of denial of rights and privileges as national; certificate of identity pending judgment. If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have instituted such an action in court, he may, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic or consular officer of the United States in the foreign country in which

he is residing a certificate of identity stating that his nationality status is pending before the court, and may be admitted to the United States with such certificate upon the condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States. Such certificate of identity shall not be denied solely on the ground that such person has lost a status previously had or acquired as a national of the United States; and from any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing the reasons for his decision. The Secretary of State, with approval of the Attorney General, shall prescribe rules and regulations for the issuance of certificates of identity as above provided. Oct. 14, 1940, c. 876, Title I, Subchap. V, §503, 54 Stat. 1171."

Sec. 1993, Revised Statutes.

"All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

Act May 24, 1934—48 Stat. 797.

"CITIZENSHIP OF CHILDREN BORN ABROAD OF CITIZEN FATHERS (Acts of April 14, 1802, and February 10, 1855, as amended by Act of May 24, 1934)

Sec. 1993. Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization. (Sec. 1, Act of May 24, 1934, 48 Stat. 797; 8 U.S.C. 6)."

STATEMENT OF THE CASE.

The appellants herein claim to be children of Fong Lim Fong, alleged to be their father and a citizen of the United States at the times of their respective births, in China. Paragraph VI of the complaint alleges:

"VI

"That on or about January 24, 1951, an application was filed with the American Consulate General at Hong Kong for the issuance of a United States passport or travel document in be-

half of plaintiff, Fong Hung Wing; that on or about May 10, 1951, an application was filed with the American Consulate General at Hong Kong for the issuance of a United States passport or travel document in behalf of plaintiffs, Fong Wone Jing and Fong Ngar Jing; that the applicants and each of them were informed by the American Consulate General at Hong Kong on or about January 24, 1952, that their applications for documentation had been denied, and that 'the Consulate General declines to afford you facilities for the execution of an affidavit for the purpose of travelling to the United States'; and that the plaintiffs, Fong Wone Jing, Fong Hung Wing and Fong Ngar Jing, claim that the refusal of the American Consulate General at Hong Kong to permit the said Fong Wone Jing, Fong Hung Wing and Fong Ngar Jing to proceed to a port of entry in the United States for the purpose of having their admissibility determined by the administrative agency charged with such duty is an arbitrary and unreasonable refusal or denial of a right or privilege of a United States national."

The answer to paragraph VI of the complaint is contained in paragraph VI of the answer.

"VI

"Answering Paragraph VI of the Complaint, defendant has no knowledge, information or belief as to the allegations contained in Paragraph VI of the Complaint and therefore denies the same."

Page 4 of appellants' brief, first paragraph, makes the following statement:

> "Following denial by the American Consulate General at Hong Kong of appellants' application to that Consulate for travel documents to permit them to proceed to the United States this suit was brought in the Court below. Appellants were then permitted to come forward to the United States as provided in Section 503 of the Nationality Act of 1940, supra, for the sole purpose of prosecuting this suit."

The record contains no evidence to support paragraph VI of the complaint or the quoted statement from page 4 of the brief. Appellants made no attempt to introduce any evidence to establish the jurisdictional prerequisite of 8 U.S.C. 903. It would appear to have been assumed that because an action was filed, and because certain persons appeared in Court, that ergo, the Court could and should proceed to judgment. The judge of the lower Court found that "It is not true that the permanent residence of the persons who claim to be plaintiffs * * * is within the Northern District of California or in the United States of America." Also that the evidence was not "of sufficient clarity to satisfy or convince the court" that the appellants were the blood children of the alleged father or that they were the persons they claimed to be.

The record is conclusive that prior to the filing of the complaint none of the appellants had ever been in the United States. The witnesses called by the appel-

lants were all interested persons in the claimed family of the appellants—the alleged paternal grandmother, the alleged father's brother and sister, an alleged older brother, and the three appellants. No birth, school, village, or other identification documents were produced by the appellants.

SPECIFICATIONS OF ERROR.

Appellants have made five specifications of error, but state the question involved singly as "Whether the lower court's findings are 'clearly erroneous'." Specifications 1-2-3 and 5 are embodied within the single question. Specification 4, however, raises a very important jurisdictional question.

> "4. That the District Court erred in finding that the plaintiffs-appellants did not have a claim to permanent residence within the Northern District of California or in the United States of America."

QUESTIONS PRESENTED.

1. *Jurisdiction.*

(a) Does the United States District Court have jurisdiction under 8 U.S.C. 903 to declare nationality of a foreign born person who has never been in the United States.

(b) Is it necessary under 8 U.S.C. 903 to allege and prove that a right or privilege as a national of the United States was claimed and that such right

or privilege was denied by a department or agency or executive official thereof upon the ground that appellants were not nationals of the United States.

(c) Is the action moot—Justiciable issue as to defendant.

2. *Were the lower Court's findings "clearly erroneous"?*

ARGUMENT.

1. JURISDICTION.

(a) THE DISTRICT COURT DOES NOT HAVE JURISDICTION UNDER 8 U.S.C. 903 TO DECLARE NATIONALITY OF A FOREIGN BORN PERSON WHO HAS NEVER BEEN IN THE UNITED STATES.

Appellants in their jurisdictional statement assert that the claim of right as citizens and the denial of that right by the American Consulate General at Hong Kong are pleaded in the complaint. The opening sentence states "Jurisdiction is conferred upon the Court below by Section 503 of the Nationality Act of 1940 (8 U.S.C. 903) * * *"

Section 903 became effective January 13, 1941, as part of the *"Nationality Act of 1940"*, which was passed by Congress October 14, 1940 (54 Stat. 1137; 8 U.S.C. 907), the provisions of which are found in 8 U.S.C. 901 et seq. This Act, since repealed by Public Law 414, was, as stated in its title, *a nationality statute and not an immigration statute.*

Immigration statutes refer to persons seeking to enter the United States and the requirements to be

met before they may enter this country, whereas the nationality statutes refer to citizenship in the United States. The enforcement of the immigration laws has been exclusively left to the Immigration and Naturalization Service, the only review by the Courts being that of habeas corpus. *Heikkila v. Barber,* 345 U.S. 229.

The purpose and intent of Sec. 903 (Sec. 503 of the Nationality Act of 1940) as revealed by the Congressional Record, Vol. 86, was to permit persons who had been born in the United States, or had acquired citizenship by naturalization, and who might suffer the denial of a right or privilege as a national while abroad, particularly as related to the new and more stringent expatriation sections of the Nationality Act, to have a day in Court.

Chapter IV, immediately preceding Section 503, lists various acts which raise a presumption of expatriation. Under Sec. 401, a national of the United States loses his United States citizenship by taking an oath of allegiance to a foreign state, accepting or performing duties of office for which only nationals of such state are eligible, etc. Sec. 402 creates certain presumptions of expatriation which may be overcome. If the Consul determines that a national has expatriated himself, there is no appeal. Such a person is entitled to a judicial hearing as provided in Sec. 903. A complaint for a declaratory judgment may be filed in the District of Columbia or the District in which such person claims previous residence in the

United States. Such hearing is directed to the specific issue of whether or not expatriation has occurred. The certificate of identity permits the person to enter the United States for the express purpose of prosecuting the action. There would be no question of the identity of the person making the claim to citizenship.

At the time the act was presented to the House (Vol. 86, Cong. Rec. p. 11944), Representative Dickstein gave the reason why the aforementioned statutory presumption of expatriation was included in Chapter IV.

> "For many years *native* and *naturalized* citizens who have accumulated wealth through the opportunities afforded in the United States have gone abroad, purchased chateaux and fine homes in these foreign lands, have spent their money, and their only responsibility as citizens of the United States has been to register at certain intervals as citizens of the United States, but in times of stress have demanded the protection as citizens of the United States.
>
> "There are others who through accident of birth and circumstances have been *born in the United States* of alien parents yet can claim citizenship and return at any time regardless of character or political theories or beliefs that are un-American and a danger to the country.
>
> "Not only these alien Americans but others who now are able to claim citizenship will be definitely expatriated. * * *" (Emphasis ours.)

Section 503 in its present form was not a part of the original bill which was passed by the House Septem-

ber 11, 1940. The provision which later became Section 503 was first introduced as an amendment by Senator Schwellenbach at the time the bill was reported out of the Senate Committee. (Amendment 405.) The amended Act passed the Senate September 30, 1940. The House disagreed with the Senate amendment and a joint conference was held by a committee appointed by both Houses. It was reported out of this committee on October 4, 1940, and a short debate ensued on the floor of the House. On October 6, 1940, the House having receded from its disagreement to Senate Amendment 405 (Sec. 503), the Act was passed by the House. The Act adopted contains Amendment 5, Section 503, in its present form.

The following is quoted from the discussion in the House prior to the enactment of the Nationality Act and is found in Volume 86, Part 12, pp. 13247 and 13248 of the Congressional Record:

> "That Amendment is for this purpose: where our manufacturers send agents through this country and they may have to remain five, ten or fifteen years in a foreign country we have to give them certain rights to come back."

Representative Jenkins then continues:

> "Mr. Jenkins: * * * What you are saying in this amendment is that a man who has never been in the United States at all but who claims he is a national either because his parents were or on some other ground but is not in fact a national can make application in our courts to have tested the question of whether he is a national. But suppose he wants to be admitted into this country to

do something not for the best interests of the country he can claim his day in court.

"Certainly we should not protect him as we would a boy who became a soldier. What is there in the bill to prevent the abuse of this privilege by a man who puts up a plausible claim to being what he in fact is not? * * *.

"Mr. Rees. I think I can answer the gentleman briefly. Let me call his attention to the fact that he seems to be discussing aliens. We are not talking about aliens.

"Mr. Jenkins. I am afraid the gentleman is wrong about that. I am talking about the case of a man who is not a national but who claims to be a national and who makes a showing of establishing that he is a national of this country. What have you in the bill to put up the bars against such a fellow?

"Mr. Rees. The gentleman from Ohio being familiar with these nationality laws knows that anyone who is a citizen who goes abroad can come back into the United States anytime he wants to no matter what he has done while abroad just so he has not done one thing, lost his citizenship.

"He may even have committed a crime just so he has not in some way expatriated himself as a citizen of this country. That is the present law. He does not have to bother about this process. *He can come back* to the United States and claim the protection of the laws here or the protection of our government while abroad. *Under this code we have provided certain restrictions in that situation and one of the most important is that the man who claims dual citizenship and who does not make the claim within a two-year or 90-day period after*

this bill becomes law that person has the burden of proof. Heretofore there was no burden at all. Now he loses his citizenship if he does not come into the United States within two years after this bill passes and maintain his citizenship. He is out otherwise. Except also he has two years after he reaches the age of 21.

"Mr. Jenkins. We are not very far apart on this. * * * We should make our immigration laws fair toward the men and women who is deserving but *we cannot be too strict toward the imposters and those who would undermine our government* * * *.

"Mr. Rees. * * * *In this Act we put the burden of proof upon that individual (presumed expatriate) to show that he is a citizen or a national of the United States. Along with that we have guarded the thing further. After placing the power and authority in the hands of the State Department we give him as I tried to explain a few minutes ago a day in court. The other way he can come back into the United States regardless of what we may say about it because he is still a citizen and entitled to our protection no matter how long he may have been abroad."* (Emphasis and parens ours.)

It appears from the foregoing that Representative Jenkins had in mind the possibility of a false claim to citizenship being made and the strict proof that should be required. Mr. Rees passed this question by stating that the Act was only concerned with citizens. Thus the conclusion seems well founded that Section 503 was intended to apply only to those individuals whose

citizenship was unquestioned but against whom a presumption of expatriation had arisen under Sections 401-404. (8 U.S.C. 801-804.)

The essential requisite in invoking Section 903 is that the individual concerned must be denied some right or privilege as a national of the United States *upon the ground that he is not (no longer) a national of the United States.*

> *Clark v. Inouye,* 175 F.2d 740, 742 (CA-9 1949);
> *Lee Hung, Lee Siu and Lee Jam v. Acheson* 103 F. Supp. 35 (Dec. Jan. 28, 1952);
> *Fong Nai Sun et al v. Dulles* D.C.S.D. (unreported) Central Div., Calif. July 13, 1953.

In *Dong Chew, et al v. Dulles,* No. 32093, D.C.N.D. California, decided May 21, 1953, Judge Murphy stated:

> "Invocation of 8 U.S.C. 903 is predicated upon allegation that a purported national's rights have been denied on the ground *that he is not a national of the United States.*"

Prior to the effective date of Public Law 414 (December 24, 1952) no one in the United States Department of State had authority to make a determination of nationality. Under 8 U.S.C. 901 a diplomatic or consular officer could issue a "Certificate of Loss of Nationality" to persons who may have lost their United States citizenship by expatriation.

Authority to determine nationality not having been invested in the Secretary of State, or his diplomatic and consular officers, the only certification the Consul

at Hong Kong could have made with regard to the United States nationality of any person appearing before him was that such person was *no longer* a national because of expatriation. The meaning of the word "not" in the portion of 903 which reads *"ground that they are not nationals"* is clearly "no longer." Appellants contend that the refusal of the Consul to issue a United States passport is a denial of a right and privilege of a national on the ground that the person seeking such passport is not a national. The contention is without merit. A passport is *not evidence of citizenship.*

Urtetiqui v. D'Arcy, 34 U.S. 692;

In re Gee Hop, 71 F. 274 (D.C.N.D. Calif. 1895);

Edsell v. Mark, 179 Fed. 292 (C.A. 9);

Miller v. Sinjen, 289 F. 388 (C.A. 8) (1923);

Lee Pong Tai v. Acheson, 104 F. Supp. 503 (E.D. Penn. 1952);

Scott v. McGrath, 104 F. Supp. 267 (E.D. N.Y. 1952).

A passport is issued only in the discretion of the Secretary of State,

Perkins v. Elg, 307 U.S. 325

and is generally directed to a foreign state for the purpose of protecting the holder of the passport. See cases cited above. Also *U.S. v. Browder,* 312 U.S. 335 (1941).

In *Blumen v. Haff* (1935) 78 F.2d 833, this circuit, Judges *Wilbur, Garrecht* and *Denman* presiding, found that the presentation of a Polish passport to im-

migration was a declaration or admission on the holder's part of Polish citizenship. In so holding, this court distinguished the use of a foreign passport from that of a United States passport, and then cited the *Urtetiqui, Gee Hop, Edsell* and *Miller* cases, stating: "It was held *that as against the government issuing* the passport it *was not evidence* of the citizenship of the holder."

Miller v. Sinjen, supra, was a case in which a United States passport was denied by the Charge d'Affaires in Mexico City. The Eighth Circuit said, page 394:

> "* * * a *finding* that *Plaintiff* had *ceased* to be *a citizen of the United States was not necessary to action* of the *State Department* in *denying* him a passport for the reason that the granting of a passport by the United States *is* and always has been a *discretionary* matter; and a passport when granted is not conclusive *nor is it even evidence that the person to whom it is granted* is a citizen of the United States.
>
> *Urtetiqui v. D'Arcy,* 34 U.S. 692;
>
> *In re Gee Hop,* 71 F. 274;
>
> *Edsell v. Mark,* 179 F. 292, 23 Op. Atty. Gen. 509."

The reason why the appellants went to the American Consul in the first instance is found in the Presidential Proclamation of November 14, 1941, No. 2523 (55 Stat., 1696). The Passport Act of 1918, as amended (40 Stat. 559, as amended by Act of Congress approved June 21, 1941, *Public Law 114, 77th Congress;* Chap. 210, 1st Sess., 55 Stat. 252) authorized the Pres-

ident during time of war or national emergency to impose restrictions and prohibitions upon the departure from and entry of persons into the United States. The President of the United States, under said authority, by Presidential Proclamation No. 2523 did impose travel restrictions, which, in part, read:

> "* * * No citizen of the United States or person who owes allegiance to the United States shall depart from or enter the United States * * * unless he bears a valid passport * * *"

Until the aforesaid Proclamation was made, it was unnecessary for persons claiming United States citizenship and residing abroad to obtain or have in their possession any documentation issued by a consular officer. The practice in Chinese cases was for the alleged father to prepare an affidavit of relationship and forward it to his purported son, who would then submit the document to the steamship agent. The determination of *admissibility* to the United States, *not nationality,* was made by the Immigration Service at the time of the applicant's arrival at the port of entry. In this procedure the consular officer played no part.

At the time of the passage of the Nationality Act of 1940, Presidential Proclamation No. 2523, of 1941, had obviously not been proclaimed. *There was no statute, regulation, or proclamation then in effect which required persons claiming United States citizenship to make application to a consular officer* abroad for documentation to come to the United States. There is no basis for considering that Congress had any intention

or even remotely contemplated any alteration of the well established administrative procedure for determining a derivative claim to United States citizenship made by persons who had never been in the United States. The Supreme Court had thoroughly reviewed the entire procedure and the rights of the claimant. There was no need for Congress to intervene.

The Law Relating to Immigration as It Existed at the Time of the Passage of Section 903.

Prior to the enactment of Section 903 of Title 8 U.S.C., a number of cases involving various aspects of exclusion and expulsion in immigration had been reviewed by the Supreme Court. These cases may be grouped as follows: (1) *Aliens* seeking to enter the United States for the first time; (2) *Aliens* who had been in the United States and upon seeking to return were *excluded* from admission by the Immigration Service; (3) *Aliens* in the United States whose expulsion had been ordered by a United States Commissioner and affirmed by the District Court; (4) *Aliens* whose expulsion had been ordered by the Immigration Service; (5) persons in the United States claiming United States citizenship whose expulsion was ordered; (6) persons seeking to re-enter the United States claiming United States citizenship by virtue of nativity, and who had been excluded by the Immigration Service; (7) persons who for the first time were seeking entry into the United States as citizens through derivation and who were denied admission to the United States by the Immigration Service.

The cases of persons falling within categories (1) and (2) above are considered and determined in:

Chai Chan Ping v. U.S., 130 U.S. 581;
Nishimura Ekiu v. U.S., 142 U.S. 651;
Lem Moon Sing v. U.S., 158 U.S. 538;
Tulsides v. Insular Collector, 268 U.S. 259.

Each of these cases was appealed to the Supreme Court after the dismissal of a petition for a writ of habeas corpus by the District Court had been affirmed by the Court of Appeals. The jurisdiction to review the administrative order by habeas corpus was established by the Supreme Court in

U.S. v. Jung Ah Lung, 124 U.S. 621.

The expression of the Supreme Court in *Nishimura Ekiu v. U. S.,* supra, page 659, that:

> "It is an accepted maxim of International law that every sovereign nation has the power, as inherent in sovereignty, and essential to self preservation to forbid the entrance of foreigners within its dominion, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."

has been reaffirmed and asserted in the recent case of *Shaughnessy v. U. S. ex rel. Ignatz Mezei,* 345 U.S. 206 (March 16, 1953), wherein the Supreme Court at page 210 stated:

> "Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.
>
> * * * * * * *

> "For purposes of the immigration laws, moreover, the legal incidents of an alien's entry remain unaltered whether he has been here once before or not. He is an entering alien just the same, and may be excluded if unqualified for admission under existing immigration laws."

In Groups 3 and 4 are those persons against whom *deportation* (expulsion) proceedings have been instituted—those who have had a hearing before a United States Commissioner pursuant to the Chinese Exclusion laws and those sought to be deported via administrative proceedings by Immigration.

With regard to the rights of these persons who were aliens, the United States Supreme Court in *Fong Yue Ting v. U. S.,* 149 U.S. 698, stated at page 713:

> "The power to *exclude* or to *expel* aliens being a power affecting international relations, is vested in the *political* departments of the government and is to be regulated by treaty or by act of Congress and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene."

Li Sing v. U. S., 180 U.S. 486;
Bugajewitz v. Adams, 228 U. S. 585;
Carlson v. Landon, 342 U. S. 524;
Harisiades v. Shaughnessy, 342 U.S. 580;
Shaughnessy v. U. S. ex rel. Ignatz Mezei, supra.

Groups 5, 6 and 7 concern persons who at some time during the proceedings, administrative or judicial, *made claim to United States citizenship.*

Group 5 involved persons *in* the United States claiming United States citizenship, *ordered to be deported* after denial of such claim. The case of *Chan Bak Kan v. U. S.,* 186 U.S. 193, arose under the Chinese Exclusion Acts, and it was argued that the Commissioner who had ordered appellant deported had no jurisdiction because the claim of citizenship had been made. That proposition was disposed of by Chief Justice Fuller, who stated, at page 200:

> "By the law the Chinese person must be adjudged unlawfully within the United States unless 'he shall establish by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States.' As applied to aliens there is no question of the validity of that provision, and the treaty, the legislation, and the circumstances considered, compliance with its requirements cannot be avoided by the mere assertion of citizenship. *The facts on which such a claim is rested must be made to appear, and the inestimable heritage of citizenship is not to be conceded to those who seek to avail themselves of it under pressure of a particular exigency, without being able to show that it was ever possessed.*" (Emphasis ours.)

See, also:

Ah How v. U. S., 193 U.S. 65.

Group 6 involves persons claiming United States citizenship seeking to re-enter the United States, whose entry was denied by the Immigration Service.

The Courts were *first* confronted with this question in *Quock Ting v. U. S.* (1891), 140 U.S. 417. In that case, the appellant, a Chinese, was denied entry into the United States, whereupon he applied for a writ alleging that the Chinese Exclusion laws did not apply to him and that he was illegally restrained of his liberty. The only question considered by the Supreme Court was whether the evidence below was sufficient to show that appellant was a citizen of the United States. The judgment of the Court below discharging the writ was affirmed.

It was not, however, until the case of *United States v. Sing Tuck* (1903), 194 U.S. 161, that the Supreme Court completely resolved the question of the authority of Immigration to determine the right of a person claiming United States citizenship to enter the United States. In that case Chinese persons came from China via Canada seeking admission to the United States, and at the border when questioned, by Immigration officers, gave their names, claimed birth in the United States, and would answer no further questions. Their claim to citizenship was denied, and no administrative appeal was taken. Thereafter, a petition for a writ of habeas corpus was filed and denied by the District Court, but reversed in the Circuit Court of Appeals on the ground that the parties were entitled to a judicial investigation. The Circuit Court of Appeals held

that the Act of 1894 should not be construed to submit the right of a native-born citizen of the United States to return hither to the final determination of executive officers. Mr. Justice Holmes, however, stated:

> "We are of the opinion, however, that the words quoted ('In every case where an alien is excluded * * * the decision of the appropriate immigration or customs officers * * * shall be final, unless reversed on appeal * * *') apply to a decision on the question of citizenship * * *"

Further on in his opinion, Justice Holmes said:

> "A mere allegation of citizenship is not enough. But before the courts can be called upon, the preliminary sifting process must be gone through with. Whether after that a further trial may be had we do not decide."

See, also, *U. S. v. Ju Toy,* 198 U.S. 253 (1905), wherein Justice Holmes, at page 262, stated:

> "It is established, as we have said, that the Act purports to make the decision of the Department final, whatever the ground on which the right to enter this country is claimed—as well when it is *citizenship* as when it is domicil and the belonging to a class *excepted from the exclusion acts.* U. S. v. Sing Tuck, 194 U.S. 161, 167; Lem Moon Sing v. U. S., 158 U.S. 538, 546, 547." (Emphasis ours.)

Tang Tun v. Edsell, 223 U.S. 673;

Kwock Jan Fat v. White, 253 U.S. 454.

Group 7, the last of the categories, involves persons who for the *first time* were seeking entry into the

United States claiming citizenship by derivation and who were refused admission to the United States by Immigration. This group involves citizenship pursuant to Section 1993 of the Revised Statutes. In almost every case, Section 1993 is the statute under which the claims to United States citizenship are made in the approximately 700 complaints filed by Chinese in the Northern District of California invoking Section 903 of Title 8 U.S.C. It is the statute involved in the instant case.

Although not falling squarely within the last category in that it involved *expulsion,* the case of *Ng Fung Ho v. White,* 259 U.S. 276 (1922), is of interest in that it was the first case decided by the United States Supreme Court in which a claim to United States citizenship by derivation (Section 1993, Revised Statutes) was made. Five Chinese persons were arrested as being illegally in the United States and thereafter applied for writs of habeas corpus. Ultimately one of the five was released, and the other four appealed to the Supreme Court. As to two of the appellants who made no claim to citizenship, the Supreme Court held the order of deportation valid. As to the other two appellants, who claimed to be foreign-born sons of a native-born citizen under Section 1993, and thus insisted that Congress was without power to authorize their deportation by executive order, Justice Brandeis stated:

> "If at the time of arrest they had been in legal contemplation without the borders of the United States seeking entry, the mere fact that they

> claimed to be citizens would not have entitled them under the Constitution to a judicial hearing. U. S. v. Ju Toy, 198 U.S. 253; Tang Tun v. Edsell, 223 U.S. 673."

Justice Brandeis then went on to hold that since Immigration had previously admitted appellants to the United States "as citizens" and that appellants had supported their claim by evidence sufficient if believed, to entitle them to a finding of citizenship, they were entitled to a *judicial trial de novo* of their claims. The case was then remanded to the District Court for further proceedings on the question of citizenship.

It was not until 1927 that the Supreme Court of the United States had before it a case in which a Chinese who had never resided in the United States claimed citizenship by derivation under Section 1993. Such claim had been denied by Immigration and he was excluded. In that case, *Quon Quon Poy v. Johnson,* 273 U.S. 352, Mr. Justice Sanford said, at page 358:

> "It is clear, however, in the light of the previous decisions of this court, that when the petitioner, *who had never resided in the United States, presented himself at its border for admission, the mere fact that he claimed to be a citizen did not entitle him under the Constitution to a judicial hearing;* and that unless it appeared that the Departmental officers to whom Congress had entrusted the decision of his claim, had denied him an opportunity to establish his citizenship, at a

> fair hearing, or acted in some unlawful or improper way or abused their discretion, their finding upon the question of citizenship was conclusive and not subject to review, and it was the duty of the court to dismiss the writ of habeas corpus without proceeding further. U. S. v. Sing Tuck, 194 U.S. 161, 168; U. S. v. Ju Toy, 198 U.S. 253, 263; Chin Yow v. U. S., 208 U.S. 8, 11; Tang Tun v. Edsell, 223 U.S. 673, 675; and Ng Fung Ho v. White, 259 U.S. 276, 282." (Emphasis ours.)

The decision of the Supreme Court in *Quon Quon Poy,* insofar as it related to the rights of persons seeking entry into the United States as derivative citizens, was the state of the law as it existed at the time of the passage of the Nationality Act of 1940. Persons seeking admission to the United States as citizens thereof and who had never resided therein, *were not entitled to a judicial hearing.*

Although Title 28, U.S.C. 400 (28 U.S.C. 2201) was in effect from March 3, 1911, it was not until 1938 and the Supreme Court decision of *Perkins v. Elg,* 307 U.S. 325, that it was clear that suit for declaratory judgment as to citizenship could be maintained under that section.

Marie Elizabeth Elg was born in Brooklyn, New York, on October 2, 1907. This fact was undisputed. In 1911 her mother took her to Sweden where she continued to reside until September 7, 1949. In 1929 within eight months after attaining majority, she obtained an American passport, returned to the United

States and was admitted as a citizen. Her residence in the United States continued thereafter. In November, 1934 her father voluntarily expatriated himself in Sweden. In April, 1935 Miss Elg was notified by the Department of Labor that she was an alien illegally in the United States, and threatened with deportation. In July, 1936 she applied for an American passport and was refused by the Secretary of State upon the sole ground that she was not a citizen of the United States, whereupon she commenced suit.

The *Elg* case is clearly within the 5th group of cases. The only difference is that the resort to the declaratory judgment suit under 28 U.S.C. 400 permitted a judicial determination prior to arrest under an order of deportation.

Chin Yow v. U. S., 208 U.S. 8;
Ng Fung Ho v. White, 259 U.S. 276.

The Court of Appeals' decision should be read to make this fact clear.

While the record of Congressional hearings and proceedings as to Section 903 do not so disclose, it would appear that *Perkins v. Elg* was an important influence in that Congress by adding Section 903 specifically extended the declaratory judgment jurisdiction to the District Court in the cases included within Sections 401-404 of the Nationality Act—in other words, where a right or privilege is denied on the ground a national is *no longer* a national.

The state of the law in 1940 was, therefore, (1) a resident of the United States in the United States

could file an action for declaratory judgment for a determination of citizenship, *Perkins v. Elg;* (2) a person who had never been in the United States, who claimed derivative citizenship, was *not* entitled to a judicial hearing, *Quon Quon Poy v. Johnson,* supra.

The effect of Section 503 of the Nationality Act of 1940 (8 U.S.C. 903) was to specifically extend the jurisdiction of the District Court to entertain a declaratory judgment suit by persons who were not in the United States but who *had been residents* of the United States and to permit the suit to be filed in the District of their previous residence or the District of Columbia, as they choose, and who were denied a right or privilege on the ground that they were no longer nationals, i.e., expatriated.

On March 9, 1948 the Court of Appeals for the Second Circuit in *U. S. ex rel. Medieros v. Watkin,* 166 F. 2d 897, held that one who has returned to the United States as a *repatriate* but who was ordered excluded by immigration authorities on the ground that he was an alien was not entitled to judicial determination of his claim of United States citizenship notwithstanding evidence of *prior residence* in the United States. The Court extensively reviewed the Supreme Court decision cited above.

On October 18, 1948 the Court of Appeals for the Ninth Circuit in *Carmichael v. Delaney,* 170 F. 2d 239, Judges Denman, Healy and Orr constituting the Court, Judge Healy writing the opinion, after reviewing the Supreme Court decisions and the *Medieros v.*

Watkin case of the Second Circuit did not question the rule of the *Watkin* case but held that the rule did not apply to one who *is* a resident of the United States. At page 244:

> "We do not question the rule or suggest the need or desirability of departing from it. Our thought is only that it cannot constitutionally be applied to one who is a resident of the United States. As to him the due process of law guaranteed by the Fifth Amendment would seem to require that his substantially appealed claim of citizenship be accorded a judicial trial."

The Ninth Circuit found that Delaney had made *no* entry into the United States, that he was presently a resident, and therefore was not subject to exclusion. Deportation (expulsion proceedings) was the administrative process under *Ng Fung Ho v. White, Chin Yow v. U. S.,* and *Kwock Jan Fat v. White* (all supra). Delaney was entitled to a judicial hearing on the claim of citizenship.

The next case in the Second Circuit was *U. S. ex rel. Chu Leung v. Shaughnessy,* 176 F. 2d 249, decided July 19, 1949. A Chinese who had long residence in the United States, returned to the United States in 1948. He held a United States passport and claimed citizenship. After a Board of Special Inquiry hearing he was ordered excluded as an alien by birth, not in possession of an unexpired immigration visa. The opinion, page 250, cites *Carmichael v. Delaney,* of the Ninth Circuit, as holding that a *resident* of the United

States who is excluded at the border is entitled to a judicial trial of his claim to be a citizen. The Court mistakenly assumed that Delaney was making an entry. There was no exclusion as he was a resident who was residing in the United States.

The following is quoted from page 250:

> "The considered opinion of this Court in the *Medieros* case in 1948 refused to make such an exception on the grounds of residence. We adhere to that full and recent expression and we do so without sharing the reluctance expressed by Judge Kaufman.
>
> "The criticism of this general rule in the exclusion cases, which rule was first adopted in U. S. v. Ju Toy, 198 U.S. 253, 25 S.Ct. 644, 49 L.Ed. 1040, loses its force when considered in the light of the provision for court test of nationality contained in the Nationality Act of 1940, §503, 54 Stat. 1171, 8 U.S.C.A. §903. The Act as interpreted by the courts provides for a judicial declaration of the U. S. 'Nationality' or 'citizenship' of persons claiming rights based upon such nationality or citizenship. *Bauer v. Clark,* 7 Cir., 161 F. 2d 397; *Brassert v. Biddle,* 2 Cir., 148 F.2d 134; *Chin Wing Dong v. Clark,* D.C. Wash., 76 F. Supp. 648; *Attorney General v. Ricketts,* 9 Cir., 165 F.2d 193; *Doreau v. Marshall,* 3 Cir., 170 F.2d 721. This avenue for judicial determination of his citizenship is open to the relator here."

Bauer v. Clark involved a naturalized citizen who allegedly had forfeited his rights as a citizen by taking oath of allegiance to the German Reich.

Brassert v. Biddle involved a naturalized citizenship claim and a denial thereof on a reentry.

Chin Wing Dong v. Clark involved the denial of a certificate of derivative citizenship after application made to the Commission under 8 U.S.C.A. 739.

Attorney General v. Ricketts was an expatriation case.

Doreau v. Marshall was also an expatriation case.

In all these cases there was a bona fide residence in the United States. All the cases except *Chin Wing Dong* involved the situation of a national being no longer a national because of expatriation. In *Chin Wing Dong* jurisdiction under 903 is not considered to have been proper.

The Second Circuit, in *Chu Leung,* was in error in suggesting jurisdiction under Section 903.

Ng Fung Ho v. White, supra, should have been squared away with *U. S. v. Watkin* on the question of judicial hearing.

In *Mah Ying Og v. Clark,* 81 F. Supp., November 22, 1948, District of Columbia, Judge Holtzoff in an action for declaratory judgment under 8 U.S.C. 903 denied a motion for summary judgment which had been filed, on the ground that the action of the administrative agency and the subsequent decision of the Ninth Circuit Court of Appeals in habeas corpus proceedings was res judicata on the question of citizenship. The judge held, "it is clear that the statute contemplates a trial de novo of the issue of citizen-

ship and not merely a review of the administrative action." However, the opinion states that Mah Ying Og claimed *he was born in the United States.* If he did not receive such hearing, then the 903 action would be proper. If, as is indicated by the Court of Appeals' decision in 187 F. 2d 199, Mah Ying Og *was not a native-born claimant,* but a nonresident claimant, then the Court is clearly wrong in upholding jurisdiction under Section 903. The case of *Chu Leung v. Shaughnessy,* of the Second Circuit, 176 F. 2d 729, is cited, and the language relating to Section 503 of the Nationality Act is quoted, but out of context with relation to the *Watkin* case and *Carmichael v. Delaney.*

Gan Seow Tung v. Clark, 83 F. Supp. 482, March 18, 1949, a decision of Judge Hall of the Southern District of California, is also cited by the Court of Appeals in *Mah Ying Og* as authority for a trial *de novo. But* Judge Hall cites Judge Holtzoff's decision in *Mah Ying Og* (footnote 3) as authority for a trial de novo. The judgment in this case after trial was for the defendant. No appeal was taken so the question was explored no further.

In October 1949 the complaint in *Look Yun Lin v. Acheson* No. 28,984, was filed in the Northern District of California. Look Yun Lin is a Chinese person claiming derivative citizenship who had never been in the United States. At the time the complaint was filed he was in China. A motion to dismiss was filed on the ground that "this action does not fall within

the purpose and intent of the said Section 503 of the Nationality Act of 1940." In an opinion reported at 87 F. Supp. 463, Judge Erskine upheld jurisdiction, but stated:

> "It is probably true that the general purpose behind this Nationality Act of 1940 was to codify existing law, and any novel features thereof were probably *intended to strengthen rather than loosen* naturalization and immigation laws. Therefore, the basic issue is whether a general intent of Congress to tighten the law is overridden by the inclusion in the law of a new remedy open to 'any person' aggrieved in the manner designated. Two opposing concepts are involved. On the one hand there is the desire to protect the rights of any American citizen; on the other hand is the desire to protect the courts from an avalanche of declaratory suits by parties *fraudulently alleging American nationality.* The proper balancing of these two elements can best be served through a careful scrutiny of the cases as they arise, to insure that there is prima facie a bona fide claim of citizenship. * * *"

The motion to dismiss was denied. The order denying the motion was not an appealable order and as the case has not as yet come to trial there has been no opportunity to raise the question on appeal.

No further reported discussion concerning the availability of the provisions of Section 903 to persons who had never been in the United States is found until the matter was discussed at length by Judge Goodman in *Ly Shew v. Acheson,* 110 Fed. Supp. 50.

In the *Ly Shew* case Judge Goodman, while not resting his decision on his interpretation of Section 903, suggested that that section applied only to cases of expatriation.

The *Ly Shew* and *Look Yun Lin* cases, supra, are then, the only reported expressions of Courts concerning the availability of Section 903 to cases where the person has never resided in the United States. But see *Savorgnan v. U. S.,* 338 U.S. 491.

The case of *Acheson v. Yee King Gee,* 184 F. 2d 382, was decided by this Court on October 4, 1950 after having been submitted to Judges Healy, Bone and Pope. Judge Healy wrote the opinion. There was no dispute as to the facts. Yee King Gee was born in China. His father was an American citizen. The American Consul General at Canton "declined to recognize" his nationality on the ground that the father was physically present in the United States but eight years and four months prior to appellee's birth. A certificate of identity was issued which permitted him to come to the United States. Two propositions were urged on appeal: (1) that the District Court was without jurisdiction to entertain the suit, and (2) that the father had not resided in the United States for the required ten years prior to appellee's birth.

On the first point this Court considered the question one of *venue* and not jurisdiction as the contention was that the only Court in which the action might be brought was the District Court for the District of

Columbia; the essential issue of the jurisdiction of any District Court was not squarely presented. The opinion, however, went on to hold the allegation "claims his permanent residence as Seattle, Washington, where his father resides" as sufficient

> "to invoke the jurisdition of the court below, and the court found as a fact that the claim of Seattle residence was made in good faith and upon substantial basis. It is to be noted that the statute permits the bringing of the suit regardless of whether the plaintiff is within the United States or abroad. In the circumstances in evidence the minor's claim to permanent residence where his father lived was neither irrational nor unfounded."

In view of the fact that there was no dispute as to the identity of the plaintiff, the citizenship of the father, and the relationship of plaintiff to the father, this Court was not apprised of the import of the question of jurisdiction in all the cases in which such facts were disputed. The case of *Binderings v. Pathe Exchange,* 263 U.S. 291, was cited in the opinion, Note 2, on page 384, in support of the jurisdictional holding. The following sentence is quoted from page 305. "Jurisdiction is the power to decide a justiciable controversy, and includes questions of law as well as of fact."

One additional factor to be considered by the Court as related to the problem is the significance of the jurisdictional proclamation of November 14, 1941, 55 Stat. 1696, the pertinent portion of which has been previously quoted.

The necessity of having proper documentation to come to the United States was established by the proclamation. Prior thereto all Chinese and other claimants of American citizenship by derivation came to the portals of the United States without any documentation. Their claim was heard and determined administratively by the Immigration Service or its predecessors. Review was accorded thereafter by habeas corpus or judicial hearing as previously discussed, out of which came the long line of Supreme Court decisions and particularly *Quon Quon Poy v. Johnson,* supra, also *U. S. ex rel. Madieros v. Watkins* and *Carmichael v. Delaney.*

The same need for documentation under the proclamation posed a tremendous problem specifically upon the American Consul at Hong Kong. He was literally deluged with applications to come to the United States by persons who claimed they had fathers who were American citizens. The Consul obviously had no means to know anything about these persons. His alleged failure to grant such documentation forthwith resulted in the filing of a complaint in the District Court under Sec. 903. Up to the time of the effective date of the Immigration and Nationality Act of 1952, Public Law 414, over 700 cases had been filed in the District Court for the Southern District of California. The present case before this Court is typical. Appellant has not considered the responsibility or duty of the Consul under the proclamation as of sufficient importance to warrant any evidence in the record as to what action was taken by him.

We may well assume that appellant, along with an indeterminate number of similar claimants, made an application. The Consul said: "I don't know who you are", and declined to grant the documentation. The suit was then filed and appellant was permitted to come forward by a certificate of identity. The Secretary of State is the defendant in the action. He had no knowledge of the identity or the claim of the appellant, at the time of the application, was no better informed at the so-called trial, and has gained nothing since. The trial Court is placed in no better position. It is difficult to conceive how a "justiciable controversy" could possibly have arisen out of the responsibility imposed upon the American Consul at Hong Kong, or how any Court could conclude that jurisdiction was invoked under Title 8 U.S.C. 903 to make a judicial determination of the alleged claim as presented by this appellant to the Court below.

On the jurisdiction question it is therefore submitted:

(1) There was no jurisdiction under Sec. 903 of action in the case from the beginning.

(2) There was no jurisdiction under Sec. 903 because there was no denial by the defendant within any possible meaning of the statute.

(3) There was no jurisdiction because the appellant had never resided in the United States and therefore had no claim to residence upon which to file suit either in the District Court of a claimed actual residence or the District of Columbia.

(4) There was no jurisdiction because, even assuming that the Consul did deny documentation to the United States at the inception of the claim, the granting of the certificate of identity removed the denial and permitted the appellant to come to the United States, and his claim should have been processed through the Immigration Service.

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2. THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT ARE CORRECT.

The review of the cases and the discussion of the law which have preceded under the heading *Jurisdiction,* have established the framework within which to consider the responsibility imposed upon the trial Court in this case, the similar cases presently pending on appeal, as well as the 700 odd cases still pending below. Assuming the jurisdiction, just what is the trial Court required to determine?

The appellants are Chinese persons who have lived their entire lives in China, probably somewhere in Kwantung Province, prior to coming to the United States. They speak a Chinese dialect, their culture and such education as they may have had is Chinese. On a day they probably went to the American Consul armed with a paper, presumably an application for documentation to come to the United States. The record does not disclose these facts but we think they may be fairly presumed. They claimed to be American citizens born of an American citizen father.

The Consul undoubtedly said—have you any evidence to establish your identity and your claim. Such not being forthcoming, the Consul declined to issue the requested documentation. The instant action was then filed naming the Secretary of State as the defendant, and alleging among other things that "their application for documentation had been denied"; "that the refusal of the American Consulate General at Hong Kong to permit the said (appellants) to proceed to a port of entry in the United States *for the purpose of having their admissibility determined by the administrative agency charged with such duty* is an arbitrary and unreasonable refusal or denial of a right or privilege of a United States National." (Tr. 6.) (Italics ours.)

After notice of the filing of the suit and upon request, the said American Consul at Hong Kong must have issued documentation permitting these appellants to come to the United States. This conclusion is drawn from the fact that they are here. Again we ask—what is the trial Court to determine? The Secretary of State knew nothing about the appellants, the Department of Justice certainly knew nothing about them. The area in which an investigation might have been conducted is outside the sovereign boundaries of the United States and in nowise subject to any investigation.

Plaintiffs proceeded on the theory that the Court had jurisdiction and that the judge could and should determine that the plaintiffs are "Nationals" of the United States. The defendant offered no evidence.

Appellants at page 28 of their brief concede that the burden of proof was on appellants: "We are not disposed to question where the burden of proof lies in these cases, nor whether it shifts at any stage of the proof." A very gracious concession, certainly entirely consistent with *Chan Bak Kan v. U. S.,* 186 U.S. 193, *Quon Quon Poy v. Johnson,* supra, and every Supreme Court, Court of Appeals, and District Court decision on the subject.

At the conclusion of the so-called trial, the judge by his findings has said "I don't know who you are. The relief prayed for is denied."

Appellants now before this Court have cited numerous cases on such proposition as "A finding of fact is clearly erroneous if it is against the clear weight of the evidence"; "or if it is against the positive uncontradicted and unimpeached testimony"; "unimpeached and uncontradicted testimony cannot be disregarded."

In support of their propositions are such cases as *U. S. v. U. S. Gypsum Co.,* 333 U.S. 364; *Chesapeake and Ohio Ry. Co. v. Martin,* 283 U.S. 209, and others.

We then find a group of specially selected cases in the Ninth Circuit considered on appeal in habeas corpus proceedings seeking review of the administrative proceedings in immigration. We will endeavor to place these cases into context with all the Supreme Court and Court of Appeals decisions.

Prior to the enactment of the exclusion laws in 1882 various labor interests were instrumental in

bringing cheap Chinese "coolie" labor to the United States, but thereafter this source of cheap labor ceased. However, the Exclusion Act was circumvented and for a number of years almost nullified when the Chinese discovered that it was possible to establish in State Courts the birth of anyone anywhere in the United States. The procedure was to have two witnesses swear in Court that they knew a person had been born at a certain place and date, the child of certain parents. Subsequent to such establishment of a birth record, a person claiming such record would arrive in the United States and by virtue of filing a petition for writ of habeas corpus, *U. S. v. Jung Ah Lung,* supra, and *Chin Yow v. U. S.,* supra, have the Courts determine their citizenship. Thus, from 1883 to 1904, thousands of Chinese men arriving in the United States, who freely admitted to the Collector of Customs (then responsible for immigration inspection) that they were *born in China* (the ship's manifests proving these facts are still in existence at Immigration), after being refused admission by the Collector, were brought into United States Courts by way of petition for writ of habeas corpus and were then landed by the Courts as native born citizens of the United States. The Courts became so crowded with such proceedings that referees were appointed to dispose of them. The fraudulent nature of these cases was brought to official notice and the practice stopped through the case of *U. S. v. Ju Toy,* 198 U.S. 253 (1905). In that case, the Supreme Court held that Ju Toy was not entitled to a judicial hear-

ing of his claim to United States citizenship and that as an excluded person he was not *within* the United States.

However, even prior to the *Ju Toy* decision, the Supreme Court was aware of the problem confronting the administrative agencies and the Courts in determining the right to enter of one claiming United States citizenship where that person was arriving from a foreign country in which no vital statistics were kept and investigations by United States officials were impossible.

In *Quock Ting v. U. S.*, 140 U.S. 417, decided 1891, the Supreme Court considered for the first time the rights of a Chinese claiming to be a *native* born citizen of the United States who had been excluded from admission to the United States. The facts were: Quock Ting claimed birth in San Francisco and to have resided therein to the age of ten. He returned to China with his mother where he remained to the age of sixteen. In February, 1888 he applied for admission to the United States at the Port of San Francisco and was denied. At the hearing in the Court below, his alleged father testified in behalf of petitioner and produced a so-called store book in which there was an entry of passage money paid for the boy and his mother. In discussing the testimony and evidence, Justice Field stated at page 419:

> "The testimony amounted to very little; indeed it was of no force or weight whatever. The particularity and positiveness with which he stated the place of his birth in San Francisco was evi-

> dently the *result* of *instruction* for his examination on this proceeding, and not a statement of what he had learned from his parents in years past. * * *"

Throughout the years the Courts of the United States have recognized that the effect of granting the petition for writ of habeas corpus in the cases described above was the granting of United States citizenship.

In *Chan Bak Kan v. U. S.,* 186 U.S. 193 (1902) the Supreme Court stated:

> "By the law the Chinese person must be adjudged unlawfully within the United States unless he 'shall establish by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States.' As applied to aliens there is no question of the validity of that provision, and the treaty, the legislation, and the circumstances considered, compliance with its requirements cannot be avoided by the mere assertion of citizenship. *The facts on which such a claim is rested must be made to appear. And the inestimable heritage of citizenship is not to be conceded to those who seek to avail themselves of it under pressure of a particular exigency, without being able to show that it was ever possessed."* (Emphasis ours.)

And in *U. S. v. Manzi,* 276 U.S. 463 (April 9, 1928), the Court said:

> "Citizenship is a high privilege, and when doubts exist concerning a grant of it, generally at least, they should be resolved in favor of the United States and against the claimant."

The expression of Mr. Justice Clarke in *Kwock Jan Fat v. White,* 253 U.S. 454, at p. 464, that

> "It is better that many Chinese immigrants should be improperly admitted than that one *natural* born citizen of the United States should be permanently excluded from his country"

is often quoted by those whose application for admission to the United States has been denied. However, the words take on added significance as to the *value* of citizenship when one considers that the statement was made concerning the rights of one who had previously been in the United States and had been recognized as a *native* born citizen of the United States. And the words of Justice Brandeis in *Ng Fung Ho v. White,* 259 U.S. 276, wherein deportation of one who claimed United States citizenship was sought, that:

> "* * * may result also in loss of both property and life, or *all that makes life worth living,*"

aptly expresses the value of United States citizenship!

Recognizing the limitations of the Sovereign Government of the United States to properly determine and evaluate the claims of Chinese persons to the right to enter the United States, either as aliens or as citizens thereof, the courts have placed the burden of proving admissibility on the person seeking entry. With regard to the testimony offered by these people, in the cases *involving aliens* the courts have stated:

> "And in accepting the adjudication [of Immigration Officers], we do not share the alarm of

> counsel * * * We think * * * it will leave the administration of the law where the law intends it should be left; *to the attention of officers made alert to attempts of evasion of it and instructed by experience of the fabrications which will be made to accomplish evasion.*" (Emphasis ours.)
>
> *Tulsidas v. Insular Collector,* 262 U.S. 259.

Most of the *expressions* of the courts refer, however, to claims of citizenship and the views of the Supreme Court in *Quock Ting v. U. S.,* supra, and *Chan Bak Kan v. U. S.,* supra, have previously been stated.

It was not long after the Chinese Exclusion Act of 1882 that claims to citizenship by Chinese persons were asserted in the Ninth Circuit.

Gee Fook Sing v. U. S., 49 F. 146, was a decision of Judge Hanford in January, 1892. Appellant, a Chinese, was prohibited from landing; claimed United States citizenship by birth. Although a petition for habeas corpus was filed, evidence was taken before a commissioner on the issue of citizenship. (Act of May 6, 1882, 23 Stat. 58, as amended and added by Act of July 15, 1884, 23 Stat. 115.) At page 148, Judge Hanford said:

> "The evidence in the case shows that it is an admitted fact that the appellant is of Chinese parentage. His appearance and language proves that he is in all respects, save, possibly, in the one matter of his legal citizenship, a Chinaman, and not an American. * * * Under the circumstances stated by him, but little, if any, credence should be given to his own evidence as to the place of his

> birth, and he is corroborated on this vital point only by the testimony of other Chinese persons, who confessedly have seen him but a few times, and can give only hearsay evidence."

And in *Lem Hing Dun v. U. S.,* 49 Fed. 148 (CA-9):

> "The evidence is not sufficient to make a case in favor of appellant so clear as to warrant this court in reversing the District Court upon the facts. * * *The case is such as *any imposter* could easily make."

The next case of importance is *Lee Sing Far v. U. S.,* 94 Fed. 834 (CA-9 1899). Appellant here claimed to be a *native* born citizen. She had been in China with her mother for 17 years. The right to land was denied by the Collector of the Port. Upon an application for habeas corpus the matter was referred to a special referee and commissioner. He heard the testimony and made his report thereon to the District Court, recommending that judgment of remand be entered. The report of the referee was adopted by the Court and judgment entered accordingly. The appeal was from the judgment. Judges Gilbert, Ross and Hawley comprised the Court of Appeals. Judge Hawley wrote the opinion. At the beginning of his consideration of the case, at p. 835, the judge commented on a not uncommon practice in the Chinese cases, "for counsel not to take any exception" to the report of the referee, then after entry of the judgment by the District Court to substitute attorneys who then come into Court claiming inadvertence, oversight and neglect and asked for a rehearing which if granted enabled the applicant to

supply the "missing link" in the evidence. "Such procedure * * * does not commend itself to our favor." At page 836 the following is quoted:

> "The question which we are called upon to decide is not whether there was any evidence tending to establish the fact that appellant was born in the United States, *but is whether the evidence is so clear and satisfactory* upon that point as to authorize this Court to say that the Court erred in refusing her to land, and in entering judgment that she be remanded." (Emphasis ours.)

And at page 837:

> "It therefore devolves upon her to prove to the satisfaction of the court that she was born in this country. It does not necessarily follow that because four witnesses have testified positively that she was born in San Francisco there being no witnesses to the contrary, their statements upon this question must be accepted as true. If such a rule were adopted and followed, there would be no more Chinese remanded in such cases. It is safe to say that the United States is powerless to make any proof in any case as to the place of birth of Chinese children. In the very nature of the case it would as a general rule be impossible to do so. The only protection to the government in the enforcement of the Exclusion Act in this character of case lies *in the cross examination of each* witness, on behalf of the petitioner whereby the crucial test of his credibility may be applied."

The Court is reminded that Lee Sing Far claimed *native* birth in the United States and that although the case came before the District Court on habeas corpus,

a special hearing was held on the question of citizenship by a commissioner appointed by the Court. The lack of power on the part of the United States to make any proof in *any* case as to place of birth of Chinese children has been emphasized. If such were true as to Chinese children born *in* the United States it was even more so where the Chinese was born in China. In any event, there is no burden upon the United States or its officers and agents to make *any* proof. The burden is upon the claimant, and adequate evidence of a clear and convincing effect, regardless of the astuteness of any cross examining ability of the representative of the defense, should be required. No case has been found which overruled or criticized the opinion in *Lee Sing Far.* It was reaffirmed by the same judges on May 13, 1901, in *Woey Ho v. U.S.,* 109 Fed. 888, another case of claimed native birth in which no testimony was introduced by the Government. See also the following:

Alien deportation:

Quong Sue v. U.S., 116 Fed. 316 (CA-9 1902);

Native birth deportation:

U.S. v. Leung Sam (WD NY 1902), 114 Fed. 702;

The Dauntless (CA-9 1904), 129 Fed. 715;

Native born deportation:

Lee Yuen Sue v. U.S. (CA-9 1906), 146 Fed. 670;

Chin Hung v. U.S. (CA-7 1917), 240 Fed. 341;

Yee Chung v. U.S. (CA-9 1917), 243 Fed. 126.

In 1904 Justice Holmes of the Supreme Court wrote opinions in *Ah How v. U.S.,* 193 U.S. 65; *U.S. v. Sing Tuck,* 194 U.S. 161, and *U.S. v. Ju Toy,* 198 U.S. 253.

Ah How claimed *native* birth and was ordered deported by way of expulsion.

Sing Tuck claimed *native* birth and was ordered deported by way of exclusion.

Ju Toy claimed native birth and was *excluded.*

In *Ah How,* Justice Holmes held that the Act of April 29, 1902, did not repeal §3 of the Act of May 5, 1892, putting the burden of proving the right to *remain in* the United States on the Chinese. As an expulsion case the burden would ordinarily have been on the government.

In *Sing Tuck,* Chinese persons came from China via Canada, seeking admission and claiming birth *in* the United States. The dismissal of the writ by the District Court without a hearing was reversed by the Circuit Court of Appeals on the ground that the parties concerned were entitled to a judicial investigation of their status. The Court of Appeals was reversed. The Court held, "a mere allegation of citizenship is not enough. But before the Courts can be called upon, the preliminary sifting process provided by the statutes must be gone through with." At page 168:

> "* * * it is one of the necessities of the administration of justice that even fundamental questions should be determined in an orderly way."

At page 167:

> "Before us it was argued that, by the construction of the Statute, the fact of citizenship went to the jurisdiction of the Immigration Officers (see Gonzales v. Williams, 192 U.S. 1.) * * * We are of the opinion, however, that the words quoted[1] apply to a decision on the question of citizenship, and that, even if it be true that the statute could not make that decision final, the consequence drawn by the Court of Appeals does not follow, and is not correct."

The Court did not decide the question of whether the Act could make the decision of an *executive* officer final upon the fact of citizenship.

Again on page 167:

> "In order to act at all, the executive officer must decide upon the question of citizenship * * * The first mode of attacking his decision is by taking that appeal. If the appeal fails, it then is time enough to consider whether, upon a petition showing reasonable cause, there ought to be a further trial upon habeas corpus."

And at page 168:

> "Here the issue, *if there is one,* is pure matter of fact,—a claim of citizenship under circumstances and in a form *naturally raising a suspicion of fraud."* (Emphasis ours.)

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[1] "In every case where an alien is excluded from admission into the United States . . .the decision of the appropriate immigration or customs officers, if adverse to admission of such alien, shall be final unless reversed on appeal to the Secretary of the Treasury."

In *Ju Toy* the Chinese claiming native birth was detained on board ship. He was denied permission to land by the Collector of the Port of San Francisco. This decision was affirmed by the Secretary of Commerce. The writ issued. A return and motion to dismiss the writ on the ground that the decision of the Secretary was conclusive and no abuse of authority was shown, was filed. These were denied and the District Court on seemingly new evidence decided Ju Toy was a native born citizen. After appeal to the Circuit Court of Appeals the latter Court certified three questions.

> (1) "Should a District Court * * * grant a writ of habeas corpus * * * when * * * the petition for writ alleges unlawful detention on the sole ground that petitioner does not come within the restrictions of the Chinese exclusion acts, because born in and a citizen of the United States and does not allege or show in any other way unlawful action or abuse of their discretion or powers by the immigration officers who excluded him?"
>
> (2) "In a habeas corpus proceeding should a district court of the United States dismiss the writ or should it direct a new or further hearing upon evidence to be presented * * *?"
>
> (3) "* * * —should the court treat the finding and action of such executive officers upon the question of citizenship * * * as final * * * unless it be made affirmatively to appear that such officers, in the case submitted to them, abused the discretion vested in them or in some other way in hearing and determining the same committed prejudicial error?"

The Court held:

> "We are of opinion that the first question should be answered, no; that the third question should be answered, yes, with the result that the second question should be answered that the writ should be dismissed, as it should have been dismissed in this case."

At page 263, we quote:

> "The petitioner, altho physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction and kept there while his right to enter was under debate. If, for the purpose of argument, we assume that the Fifth Amendment applies to him and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of the opinion that with regard to him due process of law does not require a judicial trial. That is the result of the cases which we have cited and the almost necessary result of the power of Congress to pass exclusion laws. That the decision may be entrusted to an executive officer and that his decision is due process of law was affirmed and explained in *Nishimura Ekiu v. U.S.* 142 U.S. 651, 660, and in *Fong Yue Ting v. U.S.* 149 U.S. 698, 713, before the authorities to which we already have referred."

Chin Yow v. U. S. (1908), 208 U.S. 8;
Tang Tun v. Edsell (1912), 223 U.S. 673;
Kwock Jan Fat v. White (1919), 253 U.S. 454.

In *Kwock Jan Fat,* the Chinese petitioner as a *resident* of the United States, intending to leave the United States on a temporary visit to China, filed an

application for a pre-investigation of his claimed status as an American citizen by birth. An elaborate investigation was made and the application was approved. Anonymous information received by the San Francisco Office of Immigration and Naturalization during his absence resulted in a denial of permission to land upon his return. His petition for a writ of habeas corpus was denied. The Supreme Court held that review of the proceedings was possible only when a full record is preserved, and for failure to so preserve the record reversed, and remanded to the District Court for a trial on the merits of the claim of citizenship.

Kwock Jan Fat must be kept clearly in mind as a Chinese who had long been a resident of the United States and who, after an elaborate investigation prior to departure from the United States had been determined to be a citizen.

In *Ng Fung Ho v. White,* 259 U.S. 276, a Chinese claim of derivative citizenship by a *resident* reached the Supreme Court following an expulsion order of deportation under the Immigration Act of 1917. The claimants had originally been admitted as citizens.

Justice Brandeis, speaking for the Court, p. 282, said:

> "If at the time of the arrest they had been in legal contemplation without the borders of the United States, seeking entry, the mere fact that they claimed to be citizens would not have entitled them under the Constitution to a judicial hearing. *U. S. v. Ju Toy,* 198 U.S. 253; *Tang Tun v. Edsell,* 223 U.S. 673." * * *

"The constitutional question presented as to them is: may a resident of the United States who claims to be a citizen be arrested and deported on executive order? The proceeding is obviously not void *ab initio. U. S. v. Sing Tuck,* 194 U.S. 161. But these petitioners did not merely assert a claim of citizenship. They supported the claim by evidence sufficient, if believed, to entitle them to a finding of citizenship. The precise question is: Does the claim of citizenship by a resident, so supported both before the immigration officer and upon petition for a writ of Habeas Corpus, entitle him to a judicial trial of this claim?"

The Court then distinguished the deportation under the Chinese exclusion law of a resident who claims citizenship, p. 283:

"There the proceeding for deportation is judicial in nature. It is commenced usually before a commissioner of the court; but on appeal to the District Court *additional evidence* may be introduced and the trial is *de novo.* * * * Here the proceeding is throughout executive in its nature.

"Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact."

"* * * where there is jurisdiction a finding of fact by the executive department is conclusive, *U. S. v. Ju Toy,* 198 U.S. 253; and courts have no power to interfere unless there was either denial of a fair hearing, *Chin Yow v. U. S.,* 208 U.S. 8, or the finding was not supported by evidence, *American School of Magnetic Healing v. McNulty,*

187 U.S. 94, or there was an application of an erroneous rule of law. *Gegiow v. Uhl,* 239 U.S. 3."

Tisi v. Tod, 264 U.S. 131, (1924) was an alien deportation (expulsion) case.

Finally, in *Quon Quon Poy v. Johnson,* 273 U.S. 352 (1927) the Supreme Court had before it the Chinese claim of derivative citizenship by one who had never resided in the United States. Admission into the United States was denied. The petitioner was *excluded.* On the petition the District Court declined to hear witnesses offered and the writ was discharged. At page 358, the Court said:

"It is clear, however, in the light of the previous decisions of this court, that when the petitioner, who never resided in the United States, presented himself at the border for admission, the mere fact that he claimed to be a citizen did not entitle him under the Constitution to a judicial hearing; and that unless it appeared that the departmental officers to whom Congress had entrusted the decision of his claim, had denied him an opportunity to establish his citizenship, at a fair hearing, or acted in some unlawful or improper way, or abused their discretion, their finding upon the question of citizenship was conclusive and not subject to review, and it was the duty of the court to dismiss the writ of habeas corpus without proceeding further. *U. S. v. Sing Tuck,* 194 U.S. 161, 168; *U. S. v. Ju Toy,* 198 U.S. 253, 263; *Chin Yow v. U. S.,* 208 U.S. 8, 11; *Tang Tun v. Edsell,* 223 U.S. 673, 675; and *Ng Fung Ho v. White,* 259 U.S. 276, 282."

On pages 14 and 15 of their brief appellants cite and quote from *Go Lun v. Nagle,* 22 F. 2d 246, 248 (C.A.-9 1927). Go Lun was a Chinese, born in China, who sought admission to the United States as a derivative citizenship claimant. He was excluded. The Court of Appeals relied upon *Tisi v. Tod,* 264 U.S. 131, a resident *alien* expulsion case. *Quon Quon Poy v. Johnson,* supra, decided in February, 1927, was either ignored or overlooked. The effect of the decision in the *Go Lun* case is to substitute the Court's opinion or conclusion, for the conclusion of the administrative officer. The denial of a fair hearing is not established by deciding merely that the decision was wrong. How can any Court decide whether to believe a Chinese witness by reading a printed record! It is an absurdity. The burden of proof is on the Chinese to produce competent evidence in a proper proceeding, if such is possible, not upon the government of the United States, its officers or agents. In the interest of the rights of the native born citizens of the United States the Courts of the United States should establish that such proof be of a nature that is clear and convincing. Verbal gymnastics directed to the evaluation of various "discrepancies" disclosed in a cold printed transcript can be no sound basis for the substitution of one opinion for another. It would seem to assume the existence of an insight transcending the usual limits of human thought. The mere drip of cases which have reached the Court of Appeals as against the thousands of claimants who have been permitted to enter via administrative pro-

ceedings should of itself have roused the Court to set a standard that would require the production of adequate proof. If a country is so backward, or primitive, that records are not required or kept, the onus is not to be placed upon those who are of the true body politic but upon the person who would make the claim to be of that body. The fathers from whom the claim would spring are charged with the responsibility to properly establish such claim from its inception.

The cases of *Gung You v. Nagle,* 34 F. 2d 848, 852; *Quan Toon Jung v. Bonham,* 119 F. 2d 915; *Wong Tsick Wye, et al v. Nagle,* 33 F. 2d 226; *Chun Kwock Quan v. Proctor,* 92 F. 2d 326; *Wong Kam Chong v. U. S.,* 111 F. 2d 707, 712; *Lee Hin v. U. S.,* 74 F. 2d 172; and *Chin Hong Yuk v. U. S.,* 23 F. 2d 174, 175, all of this circuit, are cited on pages 16, 17 and 18 of appellants' brief with regard to expressions of this Court concerning weight to be given testimony of witnesses, discrepancies, and quantum of proof.

Gung You v. Nagle was another claim to derivative citizenship. Judge Wilbur cited none of the pertinent Supreme Court cases but at great length reviewed the immigration record and then substituted his opinion for that of immigration.

In *Quan Toon Jung v. Bonham,* the question involved was again derivative citizenship claim after exclusion by immigration. This Court, at p. 920, stated:

> "Given a fair inquiry in these cases, the courts are bound to accept the determination of the ad-

> ministrative authorities on questions of fact and of the credibility of witnesses."

The Court then went on to examine the proof and to render a decision contrary to its own acknowledgment of the law.

The same may be said of *Wong Tsick Wye v. Nagle,* wherein Judge Rudkin stated, at p. 227:

> "This court and other courts having to do with immigration cases are constantly called upon to consider the effect of discrepancies of one kind or another in testimony taken before the immigration department."

Chun Kwock Quan v. Proctor is cited completely out of context in that it involved a claim of *native* citizenship by one who had *previously been recognized as a citizen of the United States.*

Although Chun, the appellant in that case, *had previously been in* the United States and was *excluded* by Immigration upon his return, Judge Denman recognized that the principles controlling a review in these circumstances had long been established by the Supreme Court and the Ninth Circuit, and stated: "The burden of proving citizenship is on the appellant," but went on to say, at page 330:

> "It is not by unfounded suspicious inferences against consistent statements of the record that an *established citizenship* may be destroyed." (Emphasis ours.)

Deportation under the Chinese Exclusion Act was the problem involved in *Wong Kam Chong v. U. S.*

The decision in that case was specifically restricted to cases where deportation was sought of one claiming to be a *native-born citizen* of the United States and who had *previously been determined* to be such *native-born* citizen by immigration officials. This case is not pertinent to the problem; however, Judge Haney did mention the problem of burden of proof at page 710:

> "Burden of proof in one sense means the duty to establish a certain fact by a certain degree of proof, such as a preponderance of the evidence, clear and convincing evidence, or beyond a reasonable doubt. In another sense it means the duty to offer evidence or the duty to go forward with the evidence."

Lee Hin v. U. S. and *Ching Hong Yuk v. U. S.* also are not in *point* in that both involved *deportation* of persons claiming to be native-born citizens of the United States.

In addition to the aforesaid cases, appellants also cite the cases of *Yuen Boo Ming v. U. S.,* 103 F. 2d 355, 358 (CA-9); *Wong Wing Foo v. McGrath,* 196 F. 2d 120, 122 (CA-9); *Acheson v. Yee King Gee,* 184 F. 2d 382 (CA-9); *Wong Gook Chun v. Proctor,* 84 F. 2d 763, 765 (CA-9), and *Tillinghast v. Wong Wing,* 33 F. 2d 290 (CA-9).

Yuen Boo Ming v. U. S. was another case involving an order of *deportation* in the case of a Chinese who prior to the order of deportation had been found and *"certified a citizen"* by Immigration. Apparently the Court found that the complaint under which appellant was arrested was not based on fact but

only on information and belief and considered the information as a "concealed charge" (p. 358). It is in this case that Judge Denman observed "* * * one of the reasons why there is current in America the phrase 'a Chinaman's chance,' " quoted by appellants herein.

As stated earlier in our brief, here we are confronted with claims to citizenship by persons about whom the government of the United States, as well as the Courts, know nothing, and if the argument as stated by appellant in his brief were accepted, then it is submitted, the phrase "not a Chinaman's chance" would be more apt to describe the position of the United States.

At page 25 of their brief, appellants cite the cases of *Acheson v. Yee King Gee* and *Wong Wing Foo v. McGrath* to support their contention that:

> "Nor is the application of Sec. 903, supra, limited to case involving alleged expatriation; it is available to any person claiming citizenship who has been refused permission to come to the United States by a consular officer."

We have previously discussed the case of *Yee King Gee.* This Court did not consider the jurisdiction aspects of Section 903 but only the question of venue. Neither did this Court, in *Wong Wing Foo,* give full consideration to the jurisdictional aspects of the case. Wong Wing Foo appeared before Immigration in possession of a United States passport and with that in mind, this Court stated:

> "* * * he was denied his claimed right to enter at once * * *"

and therefore could institute an action under 8 U.S.C. 903 without further exhausting his administrative remedies. This Court found that the District Court erred in admitting the immigration files in evidence, and the case was remanded to the District Court for further hearing.

Reference is made to the authorities and argument heretofore made with regard to jurisdiction and particularly to the significance of the passport as related to the application to the Consul at Hong Kong for documentation to come to the United States, the Presidential Proclamation of 1941, and the 903 action. *Wong Wing Foo* should be overruled.

We quote the following from page 30 of appellants' brief:

> "If this positive, uncontradicted and unimpeachable evidence be insufficient to establish citizenship under Sec. 1993 of the Revised Statutes it is difficult to see how any Chinese child of a United States citizen could establish his citizenship."

At this point, it is not amiss to say that such contention is *not a new one,* and the remarks of Judge Bourquin in *Ex parte Jew You On* (D.C. N.D. Cal. S.D.), 16 F. 2d 153, made November 24, 1926, are pertinent:

> "It is argued that, if the bare oath of two or three Chinese or other persons is not accepted, Chinese American citizens procreated in China

will be barred from this country of their fathers' nativity. *The answer is the responsibility is not the immigration officers' nor the courts'.* Like any case, the burden is the proponent's to prove it. *Perhaps not unfamiliar registry systems might be adopted.* Otherwise, this country is helpless, the exclusion policy futile, and the Chinese admitted will be limited solely by the extent there is courage to take advantage of opportunity."

and just as applicable today as they were then.

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3. THE EVIDENCE.

Appellants summarized the evidence adduced at the trial which they believe entitled them to a judgment of United States nationality on pages 18 and 19 of their brief. We quote:

> "Here the evidence submitted by appellants to establish their citizenship is positive, uncontradicted and unimpeached. The four children, the aunt and the grandmother gave testimony upon the issue."
>
> * * * * * * *
>
> "The testimony of the uncle regarding his remittances for the support of his brother's wife and children in China is to that extent corroborating of the direct testimony given by the other six witnesses."

Exactly what evidence was adduced at the trial?

(1) Neither of the alleged parents was present. There was no one who could directly testify of his own knowledge as to such parentage.

(2) The appellants and their alleged older brother testified they were related to each other and were the children of Fong Lim Fong and Ju Shee.

They are extremely interested parties, and their testimony, if admissible at all, has little weight.

> "No individual can by his own testimony give *convincing* evidence as to the place of his birth. * * * His testimony must necessarily be classed as secondary evidence, its truthfulness or falsity being entirely dependent upon the accuracy of information communicated to him by others; and being hearsay, it is entitled to little credence, unless corroborated."
>
> *Ex parte Lung Wing Wun,* 161 F. 211, 213.

This Court, in *Sue v. Nagle,* 295 F. 676 (CA-9, 1924), stated:

> "In cases of this character (Sec. 1993 derivative citizenship) experience has demonstrated that the testimony of the parties in interest as to the mere fact of relationship cannot be safely accepted or relied upon." (Words in parentheses ours.)

See, also:

Lau Hu Yuen, 85 F. 2d 327 (CA-9, 1936).

(3) The best witness appellants presented was their alleged paternal grandmother, Yee Song Mee, aka Fong Yee Shee. To what did she testify?

She testified she was the mother of Fong Lim Fong, the plaintiff's father (Tr. 25), and that she returned to her son's home in China in 1935, where she re-

mained for a period of about eleven months (Tr. 28, 34); that when she arrived in China plaintiffs, Fong Hung Wing and Fong Wone Jing, were living with her son in the village (Tr. 30); that while she was there in this village, a *son* by the name of Fong Ngar Jing was born on January 30, 1936, to her son, Fong Lim Fong, and her daughter-in-law, Jee Shee (Tr. p. 30); that from 1936 to the time of their arrival in the United States she had not seen the two older plaintiffs and had never seen the younger plaintiff (Tr. 37).

Analyzing the grandmother's testimony: (a) although she stated that her first grandson was at the village in 1935, at no time did she testify seeing the first grandson, Fong Din Dick, aka Fong Hung Fong, in China; (b) she testified that the plaintiff, *Fong Hung Wing,* was living with her son when she came to China in 1935, whereas the testimony of all the other witnesses and the allegations in the complaint show that he was *not born* at that time; (c) she testified that a *son* by the name of Fong Ngar Jing was born to her son while she was in China. Plaintiff *Fong Ngar Jing is a girl;* (d) in any event, the witness had not seen any of the plaintiffs since 1936, at which time the oldest would have been two years of age.

The only other witness who claimed to have seen the two older plaintiffs prior to their arrival in the United States was the alleged aunt, Ruby Fong. She accompanied her mother to China in 1935 and stated that the two older appellants were living in her

brother's house at that time. She first testified that the plaintiff, Fong Hung Wing, was not born while she was in China, but then changed her testimony and stated he was born while she was there. (Tr. 76.) Although she had not seen the two older plaintiffs since they were two years and a few months old, respectively, and had never seen the third appellant until her arrival in the United States in 1952, the witness positively identified them as the children of her brother.

In *Hung You Hong v. U. S.,* 48 F. 2d 67 (CA-9, 1933), this Court considered the case of one who claimed birth in Hawaii but against whom deportation (expulsion) proceedings had been brought. The subject produced a witness, Lum Hop, who testified he knew the subject when he was one or two years old, did not see him again until he was 8 or 10 years old, and did not see him again until he was 18 or 20 years old. With regard to the testimony of the witness, Judge Wilbur stated, at pages 67 and 68:

> "* * * it is obvious he *would not be able to identify the appellant from his own observation.* * * * It is at best very weak evidence to establish the fact that the appellant was the child born 30 years before in Hawaii."

As has already been shown, the testimony of the grandmother is at complete variance with the allegations made in behalf of appellants, and in any event, neither the grandmother or aunt gave any testimony that could be considered by the Court.

The testimony of the alleged uncle and guardian ad litem, William Y Fong, is of no weight in that he at *no* time saw the plaintiffs prior to their arrival in the United States in 1952. He testified (Tr. 45, 46, 47) that he supported plaintiffs and their mother over a period of years, and counsel also stated that William Fong had supported plaintiffs over the years (Tr. 85). However, evidence of such support in the form of money orders cover a period of approximately one year and do not show payment to plaintiffs or their alleged mother, Jee Shee. All were made to Fong Din Dick. There is nothing in the evidence to support the argument of counsel (Tr. p. 85) that the guardian ad litem for years had supported the appellants herein.

CONCLUSION.

The "Order for Judgment" below (Tr. 11) states: "The evidence presented by plaintiffs does not conform to the standards fixed by *Ly Shew v. Acheson*, No. 30159 and No. 31161, this day decided." Judge Goodman's opinion, 110 Fed. Supp. 50, has been extensively commented upon by appellants. (See also Judge Westover's opinion in *Mar Gong v. McGranery,* 109 F. Supp. 82.) In the argument and briefs of that case appellee herein attempted to thoroughly consider the various aspects of the 903 cases. Although much time and effort were expended, many facets of the problem were not explored. The pressure of over 700 cases in their various procedural

stages in the lower Court, and the large number of appeals, presently docketed in this Court, have motivated an attempt to present to this Court the full perspective of nonresident Chinese claims of derivative citizenship as now posed in the 903 declaratory judgment actions.

The question of jurisdiction has been squarely and, we hope, fully presented to the Court. We also hope the Court will squarely meet the issue and decide it.

If the Court passes the jurisdictional problem we hope we have squarely presented the question of the burden of proof and that the issue will likewise be met.

On the evidence we feel the appellants have a weak case and that the Court may well dispose of the case by simply finding there was no error below. This conclusion we expect in any event. But because if not met here the other problems must be met in other cases soon to follow, a decision on all aspects of the case is requested.

Dated, San Francisco, California,
October 23, 1953.

Respectfully submitted,

LLOYD H. BURKE,
United States Attorney,

CHARLES ELMER COLLETT,
Assistant United States Attorney,
Attorneys for Appellee.

MORTON M. LEVINE,
Immigration and Naturalization Service,
On the Brief.